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THE FREEDOM OF INFORMATION ACT: SHREDDING THE PAPER CURTAIN

Acquisition of information and control over its dissemination are the hallmarks of political power. While information control has always been a strategic concomitant of political power, the pervasiveness of modern mass media has rendered it invaluable. Thus, the first objective of any revolutionary force is to gain control of the information-dispensing apparatus. The manner in which information is administered within a particular society is indicative of the form of government which exists in that country. Where strict censorship and control of information exists, an authoritarian government will inevitably reside. Conversely, where information is freely accessible, representative government flourishes. In the United States, the principle that information is the currency of power is reflected in the vital issues of the day.¹

The government of the United States was established as a government "of the people, by the people, for the people."² The Founding Fathers clearly envisioned a government whose primary function was to benefit those it governed. In order to avoid accumulation of power within any one branch of government, they established a representative democracy with sovereign power divided among the Legislature, Executive and Judiciary.

The doctrine of the separation of powers was adopted by the convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution

¹ Regardless of whether it comes under the guise of news management, the credibility gap, or government secrecy the basic question at issue is the control of information. The conflict over who is going to gain information and when it shall be made available arises in various contexts. A prime example of this problem is the Watergate scandal. In addition to the alleged concealment of information pertaining to criminal activity within the White House, the most serious aspects of Watergate revolve around the testimony regarding domestic surveillance and public opinion manipulation. N.Y. Times, May 21, 1973, at 1, col. 8. These charges represent serious challenges to our Constitutional structure and will only be resolved by a complete airing of all the facts.

Questions concerning information and control of its dissemination have been posed to the courts in a number of cases. The two most significant are the trial of Daniel Ellsberg and Anthony Russo for releasing the Pentagon Papers, *United States v. Russo*, Criminal No. 9373 — CD (C.D. Cal., Dec. 29, 1971), and the recent Supreme Court decision holding that newspapermen do not have a constitutional privilege to withhold their sources of information, *Branzburg v. Hayes*, 408 U.S. 665 (1972). It should be noted that the charges against Ellsberg and Russo were subsequently dismissed. N.Y. Times, May 12, 1973, at 1, col. 8.

These controversies highlight the fundamental constitutional considerations involved in the use of information and emphasize an unspoken premise of our system: the people have a right both to receive and to distribute information.

² Gettysburg Address by Abraham Lincoln, Nov. 19, 1863.

of the governmental powers among three departments to save the people from autocracy.³

In order to assure a government of laws and not of men they embodied their political philosophies into one great document, the Constitution of the United States. The first principle upon which this newly-formed government was to function was the basic concept of accountability. The Founding Fathers realized that only an informed populace could preserve the principle of accountability and thereby prevent concentration of power within any one branch. This concept was profoundly expressed by James Madison:

Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.⁴

As government regulates daily life to a greater degree, the people's right to be more clearly informed about the activities and decision-making processes of government increases proportionately. The emergence of the United States as a world power after World War I, the Depression, and the subsequent technological and economic expansion led to greater governmental control and regulation. To meet these challenges effectively, a hybrid creature of authority evolved, *viz*, the administrative agency.

Since these agencies were answerable primarily to the Executive and were not subject to the normal checks and balances of the three major branches of government, a problem developed regarding their lack of accountability. Many agencies were operated like miniature baronies and developed protective mechanisms in order to frustrate possible inquiry. In order to eliminate the paper curtain of bureaucracy, Congress attempted the formulation of a general statutory scheme to aid free access to knowledge of agency operations by enacting section three of the Administrative Procedure Act (APA).⁵

Soon after its enactment it became apparent that, despite the clear intent of Congress, this statute was often being used as a justifica-

³ *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

⁴ Letter from James Madison to W.T. Barry, Aug. 4, 1822, *reprinted in* 9 THE WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910).

⁵ Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238 [hereinafter cited as APA]. The Congressional intent is apparent from the report of the Senate Judiciary Committee:

The section has been drawn upon the theory that administrative operations and procedures are public property which the general public . . . is entitled to know or to have the ready means of knowing with definiteness and assurance.

S. REP. NO. 752, 79th Cong., 1st Sess. 12 (1945).

tion for withholding information rather than disclosing it. By its terms, only persons "properly and directly concerned" could obtain access to agency files. The right to information was further qualified by provisions stating that an agency could, under color of law, withhold documents "in the public interest" or whenever "good cause [for confidentiality] was found."⁶ This vague language made the APA susceptible to agency manipulation⁷ and severely hampered the ability of interested parties to acquire information. Section three of the APA was described by the Senate Judiciary Committee as "full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities"⁸

The effectiveness of the APA as a public information statute was severely limited by lack of judicial review. As a result of this deficiency, an agency refusal to disclose information was, in fact, a final decision. In addition, the APA, as it pertained to public information, contained no provision for discovery in the administrative process. The combination of these factors made the APA unsuitable as a vehicle to secure information. This conclusion was expressed by the Senate: "The APA is of little or no value to the public in gaining access to the records of the Federal Government."⁹ Although the inadequacies of the APA were apparent almost from its inception, Congress took eleven years of debates and hearings¹⁰ before it promulgated an acceptable replacement. In 1966, the Freedom of Information Act¹¹ (FOIA) emerged from this exhaustive process.

The FOIA constitutes a threefold attempt to rectify the most glaring abuses of the APA. The Act provides that "any person" may acquire information from an agency, subject to nine exceptions. This provision eliminated the APA's standing requirement which necessitated a requester to be "properly and directly concerned." In addition, the FOIA shifted the burden of proof from the requester, as provided in the APA, to the Government. By virtue of this provision, the demandant must receive the information unless the agency can justify

⁶ APA § 3.

⁷ "These four restrictive and nebulously drafted clauses provided agencies and departments with pervasive means of withholding information." Comment, *The Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150, 152 (1969).

⁸ S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965) [hereinafter cited as S. REP.].

⁹ *Id.* at 5.

¹⁰ A compilation of most of the useful legislative history of the FOIA is contained in the ten page Senate Report and fourteen page House Report. See Davis, *The Information Act: A Preliminary Analysis* 34 U. CHI. L. REV. 761, 762 (1967) [hereinafter cited as Davis].

¹¹ 5 U.S.C. § 552 *et seq.* (1970) [hereinafter cited as FOIA].

its nondisclosure;¹² that is, the FOIA creates a presumption in favor of disclosure.

The final and most significant improvement of the FOIA is the judicial review provision. The import of this provision was recently articulated by Congressman Moorhead:

No law is self-enforcing, least of all a law designed to help the citizen in a contest with the government. Thus, the Freedom of Information Act has a built-in enforcement tool—the citizen's right to go to court and force the government to prove the need to withhold records.¹³

The Act specifically empowers the federal district courts with "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld. . . ."¹⁴

Contrary to expectations, the integration of the FOIA into the administrative process has been slow because of several inherent flaws. Among these is its equivocal draftsmanship.¹⁵ This would not be an insurmountable obstacle if the legislative history had provided a sufficient clarification of its nebulous sections. Unfortunately, the legislative history accompanying the FOIA has created as many problems as it has solved.

In general, the Senate Report¹⁶ complies with the intent of the drafters to a greater degree than either the House Report¹⁷ or the Attorney General's Report.¹⁸ While several courts have judicially noted that the Senate Report is the surer indication of congressional intent,¹⁹

¹² S. REP. at 8; H.R. REP. No. 1497, 89th Cong., 2d Sess. 9 (1966) [hereinafter cited as H.R. REP.].

¹³ Statement by Congressman William S. Moorhead, Chairman, Foreign Operations and Government Information Subcommittee, March 19, 1972, reprinted in *Hearings on the Freedom of Information Act Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess. 1344 (1972) [hereinafter cited as *Moorhead Hearings*].

¹⁴ FOIA § 552(a)(3).

¹⁵ Davis at 807-09.

¹⁶ S. REP., *supra* note 8.

¹⁷ H.R. REP., *supra* note 12.

¹⁸ ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (1967) [hereinafter cited as ATT'Y GEN. MEMO.]. This was a 47 page booklet compiled by the Justice Department which purported to explain the FOIA and establish guidelines for agencies.

¹⁹ In *Benson v. General Servs. Administration*, 289 F. Supp. 590 (W.D. Wash. 1968), *aff'd* on other grounds, 415 F.2d 878 (9th Cir. 1969), Chief Judge Lindberg wrote:

The House Report accompanied the bill on its passage through the House of Representatives, after the bill had already passed the Senate. . . . [T]o the extent that the two reports disagree, the surer indication of congressional intent is to be found in the Senate Report, which was available for consideration in both houses.

289 F. Supp. at 595 (emphasis added). See also *Hawkes v. IRS*, 467 F.2d 787, 794 (6th Cir. 1972); *Consumers Union of United States, Inc. v. Veteran's Administration*, 301 F. Supp. 796, 800-01 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).

the Justice Department and the agencies have relied on the restrictive interpretation of the House and the Attorney General. Since the procedural rules for implementing the FOIA are drawn up by the agencies themselves²⁰ the interpretation they adopt will determine the practical operation of the Act.

The ultimate responsibility for the success or failure of the FOIA is vested in good faith adherence to its principles by administrative officials. The statute allows a great deal of flexibility and discretion to the bureaucrat. The necessity for agency cooperation was recognized by President Johnson who urged "a constructive approach to the wording and spirit and legislative history of this measure."²¹ Further in order to achieve this goal he instructed "every official in this administration . . . to make information available to the full extent consistent with individual privacy and with the national interest."²²

Five years after its inception the House Subcommittee on Government Operations evaluated the operation of the FOIA.²³ These hearings revealed that the most significant shortcomings in the operation of the FOIA were the result of administrative foot-dragging²⁴ and widespread reluctance²⁵ of bureaucracy to honor the public's legal right to know. The sub-committee concluded:

[N]o changes in law and no directives from agency heads will necessarily convince any secrecy minded bureaucrat that public records are public property. Only day-to-day watchfulness by the Congress and the administration leaders can guarantee the freedom of government information²⁶

The intricacies of the problems generated by the equivocal draftsman-

²⁰ FOIA § 552(a)(1). See notes 56-60 and accompanying text, *infra*.

²¹ Statement by President Johnson upon signing FOIA on July 4, 1966 [hereinafter cited as Johnson Statement], reprinted in *Moorhead Hearings*, *supra* note 13, at 1080.

²² *Id.* See also ATT'Y GEN. MEMO., *supra* note 13, at iii:

Law is not wholly self-explanatory or self-executing. Its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer our agencies

Id.

²³ *Moorhead Hearings*, *supra* note 13.

²⁴ *Id.* at 1332. See also H.R. REP. NO. 1419, 92d Cong., 2d Sess. (1972) [hereinafter cited as GOVERNMENT OPERATIONS REP.]. This report stated that the major agencies took an average of 33 days to comply with requests for information. *Id.* at 8. See The Freedom of Information Analytical Chart, *Moorhead Hearings*, *supra* note 13, at 1338. See generally Gianella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations* 23 AD. L. REV. 217 (1971) [hereinafter cited as *Uniform Proposal*].

²⁵ The FOIA's shortcomings are "due . . . to resistance on the part of the huge bureaucracy" *Moorhead Hearings*, *supra* note 13, at 1332. See Testimony of Harrison Wellford and Peter Schuck, *id.* at 1253-68. See also note 33 *infra*.

²⁶ GOVERNMENT OPERATIONS REP. *supra* note 24, at 9.

ship and the contradictory legislative history will become apparent in the analysis to follow.

APPLICABILITY AND PROCEDURE

In substance the FOIA provides that "any person" may obtain "identifiable records" from "each agency" pursuant to "published rules." In the event a request is improperly denied "the district court shall determine the matter de novo and the burden is on the agency to sustain its action."

Any Person

The words "any person" clearly imply the absence of a standing requirement as a precondition for disclosure. This phrase means that "all individuals have equal rights of access" ²⁷ However, the application of this concept has been obscured by several early FOIA cases and by certain exceptions later carved out. ²⁸

As previously noted, the APA, prior to the FOIA amendment, required that a party requesting information be "properly and directly concerned." The FOIA eliminated this section and required that information be made available to "any person." Unfortunately, several courts in the early cases ²⁹ apparently required the petitioner to establish his *need to know*.

However, the *need to know* requirement could not be justified by the language of the Act and subsequent cases uniformly rejected such a requirement. In *Getman v. NLRB*, ³⁰ Judge Skelly Wright refused to inquire into the petitioner's *need to know*. The basis for this position was expressed in the following manner: "[A]ny discretionary balancing of competing interests will necessarily be inconsistent with the purpose of the Act to give agencies, and the courts as well, definitive guidelines in setting information policies." ³¹ A recent Sixth Circuit case, *Hawkes v. IRS*, ³² illustrates the extent to which the courts have rejected the *need*

²⁷ ATT'Y GEN. MEMO., *supra* note 18, at iv.

²⁸ A careful examination reveals that the demandant's need may be considered subject to the following exceptions: (1) matters involving inter-agency or intra-agency memoranda, FOIA § 552(b)(5); see notes 161-73 and accompanying text *infra*, (2) matters involving a "clearly unwarranted invasion of personal privacy," *id.* § 552(b)(6), see note 174 and accompanying text *infra*, and (3) matters involving "investigatory files," *id.* § 552(b)(7); see notes 175-86 and accompanying text *infra*.

²⁹ *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968); *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967).

³⁰ 450 F.2d 670 (D.C. Cir.), *stay denied*, 404 U.S. 1204 (1971).

³¹ *Id.* at 674 n.10.

³² 467 F.2d 787 (6th Cir. 1972). The petitioner had requested the disclosure of certain Internal Revenue Service (IRS) manuals in order to defend himself in a criminal action for

to know approach. In *Hawkes*, the court held that although the petitioners *need* had become moot by virtue of a criminal conviction for tax fraud, the FOIA still applied and, consequently, it remanded for disclosure provided there was no exemption applicable. Thus, disclosure, regardless of the demandant's need, has emerged as the accepted interpretation.³³

Identifiable Records

The FOIA requires that records sought be "identifiable." The meaning of this section was stated in the Senate Report: "The records must be identifiable by the person requesting them, *i.e.*, a *reasonable description* enabling the Government employee to locate the requested records."³⁴ Implicit in this section is the requirement that such records must be presently existing in the form requested.³⁵

While the courts have generally adopted a lenient interpretation of this requirement, certain requests have been declared unreasonable. Whether a requested document is arguably "identifiable" is a question of degree. The most frequent ground for denial is that the records are not "identifiable" by virtue of their volume. Such a case is *Shakespeare Co. v. United States*,³⁶ where the petitioner sought copies of all private rulings issued by the IRS since 1954. The court denied the request made pursuant to ordinary discovery procedures and then summarily rejected the contention that the FOIA would entitle the petitioner to

tax fraud. When his request was denied, he sued under the FOIA for the release of these documents. Prior to the resolution of the FOIA action, he was convicted and the IRS moved to dismiss the FOIA suit as moot. *See also* *American Mail Line Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969); *Stokes v. Hodgson*, 347 F. Supp. 1371 (N.D. Ga. 1972). *But see* *Misegades v. Schulyer*, 456 F.2d 255 (4th Cir. 1972).

As an alternative grounds for dismissal the IRS contended that Hawkes' request should be denied because he had an adequate remedy at law, *viz.*, the criminal discovery process. 467 F.2d at 790. *See note* 87-104 and accompanying text *infra* where the application of equitable principles to the FOIA is treated.

³³ *But see Moorhead Hearings*, *supra* note 13, at 1237 (statement by Roger C. Cramton, Chairman of the Administrative Conference of the United States): "The practical fact is that every agency official takes into account who the requester is, why he wants the information, and what he is going to use it for." *Id.*

³⁴ S. REP., *supra* note 8, at 8. *Accord*, *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

³⁵ *See Tuchinsky v. Selective Serv. Sys.*, 418 F.2d 155 (7th Cir. 1969). In this case, the Seventh Circuit held that the defendant was under no obligation to compile a master list of information which it had made available to the local boards individually. Although the denial was based on other grounds, the court said that it could have denied relief because the records were not "identifiable."

In our computerized society this is somewhat difficult to understand. Nevertheless, there is no denial that these records are not "identifiable" and consequently the plaintiff established no right under the statutory language of Section 552. *Id.* at 157-58. *But see Martin v. Neuschel*, 396 F.2d 759 (3d Cir. 1968).

³⁶ 389 F.2d 772 (Ct. Cl. 1968), *cert. denied*, 400 U.S. 820 (1970).

the documents sought. In denying this all-inclusive request, the court held that "the same rules as to identification of the particular documents sought, as well as materiality . . ."³⁷ apply to disclosure under the FOIA as they do under the Federal Rules of Civil Procedure.

However, lack of specificity is not the only ground for denial. In *Nichols v. United States*,³⁸ the plaintiff sought to examine certain three-dimensional articles related to the assassination of President Kennedy. Although the "records" were painstakingly identified, the district court held that they did not constitute "identifiable records." After examining the statute, the legislative history and other relevant sources without finding a definitive answer, District Judge Templar took refuge in Webster's Dictionary and held that "records" meant *written* documents.³⁹

Although the Act qualifies the records available with the word "identifiable," Congress was not unaware this phrase might be used as an excuse for non-disclosure by the agencies. Accordingly, the Senate Report cautions "[t]his requirement of identification is not to be used as a method of withholding records."⁴⁰ However, in *Wellford v. Hardin*,⁴¹ that is precisely what the Department of Agriculture attempted to do. The agency created a Catch-22 situation by denying the petitioner's request for lack of specificity while at the same time denying a request for the relevant indices on the grounds that they were exempt intra-agency memoranda. The court found that this ploy was clearly a violation of the FOIA and granted disclosure. The resolution of this problem illustrates the common-sense approach needed to make the FOIA an effective vehicle of disclosure. As Chief Judge Bazelon stated in *Bristol-Myers Co. v. FTC*, "When Congress acted to close the loopholes, it clearly intended to avoid creating new ones."⁴²

It is clear that the burden of identification lies with the demandant. However, the agencies should be cognizant "that the standards of identification applicable to the discovery of records in court proceedings [are] appropriate guidelines."⁴³ Under the Federal Rules the demandant need only "identify the rulings with *sufficient particularity* so that their extraction from the files may reasonably be made by the employee

³⁷ *Id.* at 778.

³⁸ 325 F. Supp. 130 (D. Kan. 1971), *aff'd on other grounds*, 460 F.2d 671 (10th Cir. 1972).

³⁹ 325 F. Supp. at 135.

⁴⁰ S. REP., *supra* note 8, at 8.

⁴¹ 315 F. Supp. 768 (D.D.C. 1970). *Accord*, *Irons v. Schulyer*, 465 F.2d 608 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972) (the court remanded for a determination of whether the commissioner should be required to make an index of all manuscripts).

⁴² 424 F.2d at 938.

⁴³ S. REP., *supra* note 8, at 2.

responsible for them."⁴⁴ Therefore, since the agencies are privy to greater knowledge of the contents of their files, they should promote the flow of information by facilitating, rather than obstructing, requests for information.

Each Agency

For the purposes of FOIA, "agency" means "each authority of the Government of the United States, whether or not it is within or subject to review by another agency"⁴⁵ This section specifically excludes the Congress⁴⁶ and the Judiciary⁴⁷ but conspicuously does not exclude the Executive. Although the President is arguably within the disclosure mandate of the FOIA, such a confrontation is extremely unlikely because of the doctrine of Executive Privilege.⁴⁸ While an in-depth treatment of Executive Privilege would prove enlightening, it is beyond the scope of this article. Suffice it to say that it is derived from sovereign power,⁴⁹ and allows the President to withhold information "in the public interest."

⁴⁴ 389 F.2d at 776 (emphasis added).

⁴⁵ FOIA § 551(1). See ATT'Y GEN. MEMO., *supra* note 18, at 4.

⁴⁶ FOIA § 552(c). "This section is not authority to withhold information from Congress." *Id.*

⁴⁷ FOIA § 551(1)(b). See *Cook v. Willingham*, 400 F.2d 885 (10th Cir. 1968) (pre-sentence investigation report submitted to the court held clearly not an agency record since the FOIA does not apply to the courts).

⁴⁸ Since the birth of our Republic, the controversy over the existence of an Executive Privilege has been waged by many eminent scholars. The recent scandal in Washington over the Watergate incident and related matters has generated much debate over the limits of Executive Privilege. A most expansive position was expressed by the then Attorney General Richard Kleindienst before a joint meeting of three Senate subcommittees. It was Attorney General Kleindienst's contention that not one of the 2.5 million employees of the Executive branch could be compelled to testify before the Legislature if the President directed otherwise. Mr. Kleindienst also opined that if the Congress objected, it could either impeach the President, cut off all funds, or wait for the next election. N.Y. Times, April 11, 1973, at 1, col. 2. It is submitted that none of Mr. Kleindienst's options are viable, and that such an unyielding position precipitates constitutional crises. Problems in this area are essentially political and should be compromised rather than polarized. Fortunately, this position was not adhered to when President Nixon agreed to allow members of his staff to testify before the Senate Select Committee on Watergate.

For some historical background on the doctrine of Executive Privilege, see *United States v. Reynolds*, 345 U.S. 1 (1953); *United States v. Curtiss-Wright Export Corp.* 299 U.S. 304, 320-21 (1936); *United States v. Burr*, 25 F. Cas. 30 (No. 14,692d) (1807). See generally *Hearings on S. 1125 Before the Subcomm. on the Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., (1971); Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A.L. REV. 1044 (1965); Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957).

⁴⁹ The original justification for Executive Privilege is found in the archaic principle that the "King can do no wrong." However, in this country, the tenet of Executive Privilege, although not mentioned in the Constitution, arose out of the separation of powers doctrine. On the one hand, the separation of powers doctrine maintains that an essential power of Congress is the authority to obtain information appropriate to its legislative function. See *McGrain v. Daugherty*, 273 U.S. 135 (1927). On the other side of the coin is the postulate

The definition of agency set forth above is not sufficiently broad to encompass all of the governmental offices⁵⁰ which the expanding Executive branch has seen fit to create. The issue of whether an agency comes within the FOIA or is within the constitutional umbrella of Executive Privilege arose in *Soucie v. David*.⁵¹ The Office of Science & Technology⁵² refused to release a copy of the Garwin Report which evaluated the government's program for the development of a supersonic transport (SST), claiming that it was not an agency subject to the FOIA.⁵³ The Court of Appeals for the District of Columbia rejected this contention and held that by virtue of its independent function, the OST is an agency and the Garwin Report is subject to the FOIA.⁵⁴

The Seventh Circuit in a series of cases⁵⁵ was faced with the issue of whether or not a FOIA suit could be maintained when a commission or agency is dissolved without a successor. The court held that a pending FOIA suit, even if instituted against an existing governmental agency, abates when the agency dissolves without a successor.

Published Rules

By the terms of sub-section (a)(1) of the FOIA,⁵⁶ each agency is required to publish in the Federal Register regulations outlining the

that another branch of government cannot question the manner in which the President exercises his assigned Executive powers.

⁵⁰ Examples of these are the Federal Parole Board and Amtrak.

⁵¹ 448 F.2d 1067 (D.C. Cir. 1971).

⁵² The statutory authority for the Office of Science and Technology (OST) is as follows: The OST was established in the Executive Office of the President by Reorganization Plan No. 2 of 1962, Pt. I, 3 C.F.R. 879 (1959-1963 Compilation), set out following 5 U.S.C. § 133z-15 (1964), at 247-50. Section 133z-15 has been replaced by 5 U.S.C. § 913 (1970).

448 F.2d at 1070 n.2.

⁵³ 448 F.2d at 1071. The OST also claimed that the Garwin Report was an inter-agency memorandum, exempt from disclosure by virtue of FOIA § 552(b)(5). See notes 161-73 and accompanying text, *infra*, for treatment of the fifth exemption.

⁵⁴ 448 F.2d at 1073.

⁵⁵ *Skolnick v. Campbell*, 454 F.2d 531 (7th Cir. 1971); *Skolnick v. Kerner*, 435 F.2d 694 (7th Cir. 1970); *Skolnick v. Parsons*, 397 F.2d 523 (7th Cir. 1968).

⁵⁶ FOIA § 552(a)(1).

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law,

procedures which the public must follow in order to obtain information from that agency.⁵⁷ The agencies are required to publish "rules of procedures" and "substantive rules of general applicability." Compliance with this requirement is assured by the sanction that no person shall be "adversely affected" by a matter required to be published which is not published.⁵⁸ However, not all things are required to be published. Because of the problem of printing *too much* material⁵⁹ in the Federal Register, the FOIA contains a provision whereby material that is reasonably available to a class of people is incorporated by reference.

The entire provision has been severely criticized⁶⁰ because it allows each agency to formulate its own "hidden common-law." Unfortunately, the result has often been confusing and contradictory regulations which frustrate the administration of the FOIA.

Sub-division (2)⁶¹ of section (a) refers to the "case law" of the

and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

⁵⁷ *Abel v. IRS*, 70-2 USTC ¶9590 (C.D. Cal., July 10, 1970) No. 70-786-IH Civil.

⁵⁸ FOIA § 552(a)(1). *But see* *Hicks v. Freeman*, 397 F.2d 193 (4th Cir. 1968), cert. denied, 393 U.S. 1064 (1969) (failure to publish a personnel reduction directive did not effect its efficacy because it was solely internal and had no general applicability).

⁵⁹ S. REP., *supra* note 8, at 6; ATT'Y GEN. MEMO., *supra* note 18, at 5.

⁶⁰ *Moorhead Hearings*, *supra* note 13, at 1257 (remarks by Harrison Wellford of the Center for the Study of Responsive Law); Recommendation No. 24, *The Principles and Guidelines For Implementation of the Freedom of Information Act* (1971), reprinted in *Moorhead Hearings*, *supra* note 13, at 1232; Memorandum from William H. Rehnquist and William D. Ruckelshaus to the General Counsels of All Federal Dep'ts and Agencies, Dec. 8, 1969 [hereinafter cited as Rehnquist Memo.], reprinted in *Moorhead Hearings*, *supra* note 13, at 1132. A comprehensive analysis of agency practices relating to the FOIA would indicate that the establishment of uniform regulations is needed. See notes 23-26 *supra* for discussion of the Subcommittee questionnaires on agency FOIA practices.

⁶¹ FOIA § 552(a)(2) provides:

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information, for the public as to any matter issued, adopted, or promulgated after July 4, 1967,

agencies. By virtue of this section, the "case law" must be made available for public inspection and copying. In addition to requiring that final adjudicatory opinions and policy interpretations be made available, subsection (a)(2)(C) extends to "administrative staff manuals . . . that affect a member of the public"⁶² and has been the subject of recent litigation. In *Hawkes v. IRS*,⁶³ the Sixth Circuit undertook an in-depth treatment of this subsection⁶⁴ and concluded that a manual relating to examination of returns and the interrogation of taxpayers by Internal Revenue Service agents was administrative in character and clearly discloseable under FOIA § 552(a)(2)(C).

Pursuant to the statutory grant of subsection (a), many agencies follow a procedure whereby denials of information are appealable within the agency thereby affording themselves a defense under the doctrine of exhaustion of remedies⁶⁵ against an action under the FOIA. While the exhaustion of remedies doctrine has been favorably received by the courts⁶⁶ the delay such a requirement engenders is often highly prejudicial to the demandant. Yet the courts have not held that such

and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

For legislative history, see S. REP., *supra* note 8, at 6-7; H.R. REP., *supra* note 12, at 7-8; ATT'Y GEN. MEMO., *supra* note 18, at 13-22.

⁶² However, this provision is limited in scope by the second exemption, FOIA § 552(b)(2) which exempts from disclosure matters "related solely to the internal personnel rules and practices of an agency." See notes 142-48 and accompanying text *infra*, for treatment of this second exemption.

⁶³ 467 F.2d 787 (6th Cir. 1972). *Accord*, *City of Concord v. Ambrose*, 333 F. Supp. 958 (N.D. Cal. 1971).

⁶⁴ The court noted that the word "administrative" was not included in the original text of the bill. The court adopted the Senate's interpretation holding that the purpose of this addition was to exclude from public view staff manuals pertaining to law enforcement matters but not those relating to administrative matters. 467 F.2d at 794. See S. REP., *supra* note 8, at 2.

The exception for law enforcement materials . . . is . . . a very narrow one and is to be applied only where the sole effect of disclosure would be to enable law violators to escape detection.

467 F.2d at 795.

⁶⁵ According to the Supreme Court, a primary purpose served by exhaustion of remedies is "the avoidance of premature interruption of the administrative process." *McKart v. United States*, 395 U.S. 185, 193 (1969). See *Tuchinsky v. Selective Serv. Sys.* 418 F.2d 155, 158 (7th Cir. 1969) (only after administrative process is exhausted is the judicial process available).

⁶⁶ *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971); *Ackerly v. Ley*, 420 F.2d 1336 (D.C. Cir. 1969); *Tuchinsky v. Selective Serv. Sys.*, 418 F.2d 155 (7th Cir. 1969); *Abel v. IRS*, No. 70-786-IH Civil, (C.D. Cal., July 10, 1970). But see *Hawkes v. IRS*, 467 F.2d 787, 792, n.6 (6th Cir. 1972) (exhaustion of the criminal discovery process is not a prerequisite for disclosure) (dictum).

prejudice amounts to a denial of due process.⁶⁷ It should be noted that at least one circuit has ruled that while exhaustion is required, it is required only to a reasonable degree.⁶⁸

The Court Shall Determine the Matter De Novo

Unquestionably, the most significant provision of the FOIA is sub-section (a)(3)⁶⁹ which provides that de novo judicial review is available in all cases arising under the Act. Any person from whom information has been withheld may initiate an action against the agency in a federal district court by filing a complaint.⁷⁰ An analysis of the cases⁷¹ decided to date reveals that the court-enforcement provision has been effective⁷² in securing information from recalcitrant agencies. In the areas of privileged financial information⁷³ and internal memoranda⁷⁴ the courts have favored the public's right to know. But where

⁶⁷ See *Harbolt v. Alldredge*, 464 F.2d 1243 (10th Cir.), *cert. denied*, 409 U.S. 1025 (1972); *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 711 (D.C. Cir. 1971); *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969).

⁶⁸ *Ackerly v. Ley*, 420 F.2d 1336 (D.C. Cir. 1969).

And the fact that the appellant might, presumably by a combination of intuition and diligent research ferret out some of the materials relied upon is surely no reason to suppose that Congress made revelation under the Freedom of Information Act contingent upon a showing of exhaustion of one's own ingenuity.

Id. at 1342.

⁶⁹ FOIA § 552(a)(3) provides:

Except with respect to the records made available under paragraphs (1) and (2) of this sub-section, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaint. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

⁷⁰ *Farrell v. Ignatius*, 283 F. Supp. 58 (S.D.N.Y. 1968) (order to show cause held not sufficient to commence a FOIA action).

⁷¹ Unfortunately, in many instances, the prospect of expensive litigation acts to discourage the private citizen. This fear is borne out by the fact that the vast majority of FOIA cases are brought by corporations or persons seeking private benefit. Accordingly, the public interest which was to be the primary beneficiary of the FOIA has been left to its own designs and has come up empty. *Moorhead Hearings*, *supra* note 13, at 1255-60 (remarks by Harrison Wellford of the Center of the Study of Responsive Law).

⁷² It is interesting to note that government success in FOIA litigation is about 50%, while it approaches 90% in other actions.

⁷³ FOIA § 552(b)(4); see notes 154-60 and accompanying text, *infra*, for treatment of the fourth exemption.

⁷⁴ FOIA § 552(b)(5); see notes 161-73 and accompanying text, *infra*, for treatment of the fifth exemption.

records pertaining to national security⁷⁵ and investigatory files⁷⁶ are involved, the courts have been more protective of agency prerogatives.

For a variety of reasons administrative officials tend to be overly protective of their respective domains.⁷⁷ However, the FOIA was intended to and has, to a certain extent, eliminated this attitude. The basic reason for this shift in attitude is that an administrator is more deliberate when faced with the prospect of a judicial proceeding in which he bears the burden of justifying his refusal to disclose. In order to promote the FOIA through accommodation rather than litigation which is burdensome to both the demandant and the government, the Freedom of Information Committee⁷⁸ was established within the Justice Department.

The language of subsection (a)(3), specifically the first sentence, has led to some uncertainty over the scope of the judicial review provision. This awkwardly worded section can be read to exclude from judicial review those records pertaining to rules of general applicability⁷⁹ and agency "case law."⁸⁰

In *City of Concord v. Ambrose*,⁸¹ the district court in Northern California fell prey to the ambiguity of the language in question. The

⁷⁵ FOIA § 552(b)(1); see notes 109-41 and accompanying text, *infra*, for treatment of the first exemption.

⁷⁶ FOIA § 552(b)(7); see notes 175-86 and accompanying text, *infra*, for treatment of the seventh exemption.

FOIA § 552(a)(3).

The burden of proof is placed upon the agency which is the only party able to justify the withholding. A private citizen cannot be asked to prove that an agency has withheld information improperly because he will not know the reasons for the agency action.

H.R. REP., *supra* note 12, at 9.

⁷⁷ In a memorandum sent to the general counsels of the federal agencies, Mr. Justice Rehnquist, then head of the Office of Legal Counsel, stated:

Although the legal basis for denying a particular request under the act [FOIA] may seem quite strong to an agency at the time it elects finally to refuse access to the requested records, *the justification may appear considerably less strong when later viewed, in the context of adversary litigation, from the detached prospective of a court and from the standpoint of the broad public policy of the act . . .* (emphasis added).

Rehnquist Memo., *supra* note 60.

⁷⁸ The Freedom of Information Committee was instituted pursuant to the Rehnquist Memo. The aim of the Committee was to promote FOIA through accommodation rather than "litigation burdensome both to the requester and to the Government."

Through March, 1972, the Committee had received some 500 inquiries most of which were resolved amicably, while approximately 120 resulted in "consultations" between the agency and the Committee. Although the FOI Committee does not record precisely all of its business, the House Committee on Government Operations recognizes "the work of the FOI Committee in helping . . . bring about a more enlightened administration of the act within the Federal bureaucracy." GOVERNMENT OPERATIONS REP., *supra* note 24, at 69.

⁷⁹ FOIA § 552(a)(1).

⁸⁰ FOIA § 552(a)(2).

⁸¹ 333 F. Supp. 958 (N.D. Cal. 1971). *But cf.* Epstein v. Resor, 421 F.2d 930 (9th Cir. 1970).

court held that the act established mutually exclusive categories and that the judicial review section must be construed to exclude those records described in subsections (a)(1) and (a)(2).

However, this interpretation is not to be found in the legislative history. The Senate Report,⁸² the House Report,⁸³ and the Attorney General's Memorandum⁸⁴ all concur in the view that judicial enforcement is available to obtain those records pertaining to rules of general applicability and agency "case law." This interpretation was adopted by the District of Columbia Circuit in *American Mail Line Ltd. v. Gulick*:⁸⁵

[I]f the agency refuses to comply with paragraphs (1) or (2) it is then subject to suit under the processes spelled out in paragraph (3).⁸⁶

EQUITABLE DISCRETION

The FOIA vests in the district courts the jurisdiction "to enjoin the agency from withholding agency records." The propriety of an agency denial is to be determined de novo by the district court in order to prevent the judicial review provision "from becoming meaningless judicial sanctioning of agency discretion."⁸⁷ Despite the fact that the distinction between law and equity has been abolished,⁸⁸ that distinction has spawned a significant clash of authority under FOIA. The remedy of injunction is an equitable one and a petition thereunder may be subject to the court's intrinsic power to exercise its discretion. The problem arises as to the extent to which a court may exercise its equitable discretion. May the court look beyond the technical applicability of the exemptions?

An examination of the statute reveals no language⁸⁹ that requires the courts to order disclosure unless the materials sought are specifically exempt. The absence of any express provision making enforcement mandatory may have been an oversight. Unfortunately, the legislative

⁸² S. REP., *supra* note 8, at 6 & 8.

⁸³ H.R. REP., *supra* note 12, at 2 & 9.

⁸⁴ ATT'Y GEN. MEMO., *supra* note 18, at 23, 27-28.

⁸⁵ 411 F.2d 696 (D.C. Cir. 1969).

⁸⁶ *Id.* at 701. *Accord*, *Irons v. Schulyer*, 465 F.2d 608 (D.C. Cir. 1972); *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971), *stay denied*, 404 U.S. 1204 (1971). *Contra*, *City of Concord v. Ambrose*, 333 F. Supp. 958, 960 (N.D. Cal. 1971); *Moorhead Hearings*, *supra* note 13, at 1204 (current interpretation held by Justice Dep't).

⁸⁷ S. REP., *supra* note 8, at 8.

⁸⁸ FED. R. CIV. P. 2.

⁸⁹ *But see* FOIA § 552 (c) which provides "[t]his section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." (emphasis added).

history on this point is unclear. The House Report provides that "[t]he Court will have authority whenever it considers such action *equitable and appropriate* to enjoin the agency from withholding its records"⁹⁰ On the other hand, the Senate Report describes the purpose of the statute as "establish[ing] a general philosophy of full agency disclosure unless information is exempted under clearly *delineated statutory language*"⁹¹ The result is that the legislative history is inconclusive.

The case law, however, presents a more definitive picture. There have been several lower court decisions⁹² adopting the view that broad equitable discretion is available under the FOIA, but to date no court of appeals has maintained that position. At least three circuit courts have interpreted the FOIA to preclude the application of equitable discretion.⁹³

⁹⁰ H.R. REP., *supra* note 12, at 9 (emphasis added). This view is echoed by the Attorney General's memorandum which states "the district court is free to exercise the traditional discretion of a court of equity in determining whether . . . the relief . . . is *equitable and appropriate*. . . ." ATT'Y GEN. MEMO., *supra* note 18, at 28 (emphasis added).

⁹¹ S. REP., *supra* note 8, at 3 (emphasis added). See note 19 *supra*.

⁹² All of these cases were decided very early in the life of FOIA, which may help to explain their position. See *Long v. IRS*, 339 F. Supp. 1266 (W.D. Wash. 1971) (by implication); *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969) (mem.), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971) (court held that it must, "according to traditional equity principles, weigh the effects of disclosure and non-disclosure and determine the best course to follow"). 301 F. Supp. at 806. See also *Cooney v. Sun Shipbuilding and Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968); *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967).

⁹³ The District of Columbia Circuit, in *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971) said, "a District Court has no equitable jurisdiction to deny disclosure on grounds other than those laid out under one of the Act's enumerated exemptions." *Id.* at 678. See *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971). See also *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969).

The Fourth Circuit refused to apply equitable discretion in *Wellford v. Hardin*, 444 F.2d 21 (4th Cir. 1971).

The Sixth Circuit adopted a similar position in *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 661 (6th Cir. 1972).

It should also be noted that the position of the Ninth Circuit as to the role of judicial discretion is somewhat clouded. In *Benson v. GSA*, 415 F.2d 878 (9th Cir. 1969), the court, referring to the fifth exemption, stated:

In exercising the equity jurisdiction conferred by the Freedom of Information Act, the court must weigh the effects of disclosure and nondisclosure, according to traditional equity principles and determine the best course to follow in the given circumstances. The effect on the public is the primary consideration.

Id. at 880.

Thus, it appears that the Ninth Circuit would apply its equitable discretion. However, in the subsequent case of *Epstein v. Resor*, 421 F.2d 930 (9th Cir.), *cert. denied*, 393 U.S. 965 (1970), this position was qualified to the extent that such discretion would not be applied with respect to the first and third exemptions.

Section (b)(1) is couched in terms significantly different from the other exemptions. Under the others (with the exception of the third) the very basis for the agency determination—the underlying factual contention—is open to judicial review. [citations omitted]. Under (b)(1) this is not so. The function of determining whether secrecy is required in the national interest is expressly assigned to the

However, there is some dicta to indicate the majority will not be tied down if "special circumstances [arise] which can properly be argued as overriding the statutory mandates."⁹⁴ By not foreclosing the application of judicial discretion in exceptional instances, the door to future development was left ajar. This threshold was crossed in the recent case of *Bannercraft Clothing Co. v. Renegotiation Bd.*⁹⁵

There, the Circuit Court of Appeals for the District of Columbia affirmed a district court decision enjoining agency proceedings pending judicial determination of the applicability of the FOIA to certain documents relevant to those proceedings.⁹⁶ The agency contested the propriety of the preliminary injunction claiming (1) the FOIA does not empower the district court to enjoin agency proceedings, and (2) even if it did, the plaintiff must exhaust all administrative remedies.⁹⁷

The court justified this extension of the FOIA on two grounds. First, the legislative intent revealed that one of the abuses FOIA was designed to eliminate was the dilemma of those confronted with secret laws or incomplete data in administrative proceedings.⁹⁸ The court bolstered its position by analogizing to a subsidiary provision of the Act, *i.e.*, that agency material may not be used against a party if it has not been made available to him.⁹⁹ Secondly, the court invoked its equitable powers to prevent injustice and avoid irreparable injury.¹⁰⁰

The court claimed that the application of equitable principles in *Bannercraft* was consistent with the denial of equitable power to circumvent the technical applicability of the exemptions. While the courts have interpreted Congressional intent to preclude consideration of matters apart from the specific exemptions of the Act itself,¹⁰¹ it hardly follows that Congress intended to prevent the use of equitable means to effectuate the policy of the statute. As Judge Skelly Wright stated:

executive. The judicial inquiry is limited to the question whether an appropriate executive order has been made as to the material in question.

421 F.2d at 933.

⁹⁴ 464 F.2d at 662. "There may be exceptional circumstances [invoking the] operation of limited judicial discretion . . ." 448 F.2d at 1077.

⁹⁵ 466 F.2d 345 (D.C. Cir. 1972), *cert. granted*, 41 U.S.L.W. 3409 (U.S. Jan. 23, 1973) (No. 72-822).

⁹⁶ 466 F.2d at 349.

⁹⁷ 466 F.2d at 348-49.

⁹⁸ 466 F.2d at 351. *See* S. REP., *supra* note 8, at 7. "This change will prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way in which to discover it." *Id.* *See also* H.R. REP., *supra* note 12, at 8.

⁹⁹ FOIA § 552(a)(2). *See also* FOIA § 552(a)(3) which provides that FOIA proceedings are to "take precedence on the docket over all other causes."

¹⁰⁰ 466 F.2d at 356.

¹⁰¹ *See* note 93 and accompanying text *supra*.

It is one thing to say that Congress has decided for itself which kinds of documents should be disclosed, leaving little if any discretion for the courts. It is quite another to suggest that Congress has deliberately withheld the tools necessary for courts to implement its substantive decisions.¹⁰²

Judge MacKinnon dissented vigorously, claiming that "[T]he appellees 'need for judicial intervention' is wholly irrelevant to determination of the jurisdiction of the District Courts in these cases."¹⁰³ He maintained that the FOIA empowers the court to issue injunctive relief on narrow, specific grounds and that these remedies are "exclusive."¹⁰⁴

Although there is some support for the position taken in *Banner-craft*,¹⁰⁵ it is doubtful that the Supreme Court will uphold this decision in its entirety. Recently, in *EPA v. Mink*¹⁰⁶ the Supreme Court adopted a strict construction of the FOIA; it limited the application of the Act to what is expressly provided and not "*what congress would have provided.*" The Court stated:

Moreover, in actions under the Freedom of Information Act, courts are not given the option to impose alternative sanctions¹⁰⁷

Accordingly, an extension of judicial authority without specific Congressional sanction would appear to be beyond the scope of the FOIA.¹⁰⁸

THE EXEMPTIONS

Section b(1): [Matters] Specifically Required by Executive Order to Be Kept Secret in the Interest of the National Defense of Foreign Policy.

While all of the exemptions represent a tacit concession to Execu-

¹⁰² 466 F.2d at 354. See also *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 426 (1965).

¹⁰³ 466 F.2d at 362.

¹⁰⁴ *Id.*

¹⁰⁵ *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970). Where a request for a temporary injunction of a rulemaking proceeding was deemed not ripe for adjudication inasmuch as no showing of irreparable injury had been made, Chief Judge Bazelon wrote "[i]f there is substantial delay in determining appellant's right to disclosure, or in achieving such disclosure as the statute requires, the District Court may consider the propriety of granting temporary relief." *Id.* at 940 (dictum). See *Steadman Security Corp. v. SEC*, 41 U.S.L.W. 2405 (Feb. 6, 1973) (dictum). But see *Hawkes v. IRS*, 467 F.2d 787 (6th Cir. 1972).

¹⁰⁶ 410 U.S. 73 (1973).

¹⁰⁷ *Id.* at 86 n.13.

¹⁰⁸ Another factor militating against an affirmation of *Banner-craft* is the *private* nature of the interest asserted. The Supreme Court in *Mink* emphasized the judicially enforceable right of the *public* to secure information. These factors, coupled with the potential misapplication of FOIA as a vehicle for obstruction of administrative processes, indicate a Supreme Court narrowing of the holding to its facts because of the nature of the renegotiation process and the inability of the lower court to afford the necessary relief, or, a reversal of the *Banner-craft* decision.

tive Privilege, nowhere is this more vividly apparent than in the first exemption.¹⁰⁹ The Freedom of Information Act rejected the broad, almost insurmountable standard established by the APA.¹¹⁰ By eliminating the "public interest" standard, the FOIA attempted to "delimit more narrowly the exception and give it a more precise definition."¹¹¹ The new standard authorizes the withholding of documents classified by Executive Order as "secret." Attorney General Ramsey Clark expressed dissatisfaction with the arbitrariness tolerated by this new standard.¹¹² He cautioned that Executive Orders "should define as precisely as is feasible the categories of matters to be exempted."¹¹³

The courts were called upon to determine the scope of the "secret matter" exemption in several cases involving dramatic national issues.¹¹⁴ Does the word "specifically" mean that the document in question be the subject of a specific Executive Order, or is Executive Order 10501,¹¹⁵ establishing a system of classification, a sufficient basis upon which to claim the exemption? If no specific order is necessary, is the district court empowered to ascertain the propriety of a security classification?

¹⁰⁹ The FOIA gives "full recognition to the fact that the President must at times act in secret in the exercise of his constitutional duties . . ." 112 CONG. REC. 13,022, June 20, 1966 (remarks of Congressman Dole). The FOIA is "not intended to impinge upon the appropriate power of the Executive . . ." 112 CONG. REC. 13,008, June 20, 1966. (remarks of Congressman Moss).

¹¹⁰ Administrative Procedure Act of 1946, ch. 324, 60 Stat. § 3(a)(1). This section authorized the withholding of documents where "secrecy in the public interest" was required. The inadequacies of this provision were summarized as follows: "Rather than protecting the public's interest, it has caused widespread public dissatisfaction and confusion." S. REP., *supra* note 8, at 8.

¹¹¹ *Id.*

¹¹² ATT'Y GEN. MEMO., *supra* note 18, at 30.

¹¹³ *Id.*

¹¹⁴ *Mink v. EPA*, 464 F.2d 742 (D.C. Cir. 1971) (reports prepared on Cannikin, nuclear underground test); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) (disclosure of the Garwin Report, a report on the SST compiled on Presidential request); *Epstein v. Resor*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970) (Operation Keelhaul, documents relating to the repatriation of Soviet citizens after the Second World War).

¹¹⁵ 3 C.F.R. 979 (1949-1953 Comp.), *as amended*, 3 C.F.R. 292 (1971), 50 U.S.C. § 401 (1970). This Executive Order establishing new classification guidelines, was issued in 1953 by President Eisenhower. However, this order was susceptible to great abuse and by 1972 it was conservatively estimated that over 20 million documents were improperly classified. *Moorhead Hearings*, *supra* note 13, at 1032 (remarks of Congressman Horton).

In March, 1972, President Nixon purported to eliminate the evils inherent in the classification system by issuing Exec. Order No. 11,652, 3 C.F.R. 375 (1973) [hereinafter Executive Order]. Although President Nixon's accompanying statement appeared very promising, Representative Moorhead after a preliminary study stated that "the Executive order itself does not live up to the laudable goals contained in the President's statement." *Moorhead Hearings*, *supra* note 13, at 1174.

This topic has been the subject of much debate and reflects another aspect of the problem of insuring the free flow of information. See generally Note, *The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130 (1972) [hereinafter cited as *National Security Interest*].

In *Epstein v. Resor*,¹¹⁶ the Ninth Circuit adopted a broad interpretation of the first exemption. The controversy arose when the Army denied Epstein access to certain historical documents. When a FOIA suit was instituted, the district court granted the Army's motion for summary judgment. That court claimed that the power to decide the issue *de novo* was limited to "whether classifications within the first exemption [are] clearly arbitrary and unsupportable."¹¹⁷ This reasoning was affirmed by the court of appeals which stated: "[T]he judiciary has neither the 'aptitude, facilities nor responsibility' to review these essentially political decisions."¹¹⁸ The court further held that judicial inquiry into the arbitrariness of the agency classification did not call for *in camera* examination¹¹⁹ in this case because the file was undergoing a paper-by-paper re-evaluation.

The Court of Appeals for the District of Columbia veered from this broad reading of the first exemption in *Soucie v. David*.¹²⁰ There, the government denied disclosure of the Garwin Report (evaluation of SST program compiled at Presidential request). The point of conflict was whether the Garwin Report was subject to the FOIA. The court found that it was and remanded the case for determination of whether any exemption applied. Its instruction as to the first exemption was that "[t]he court can most effectively undertake the statutory *de novo* evaluation of the Government's claim by examining the Report *in camera*."¹²¹ This language set the stage for the D.C. Circuit in the *Mink* case.

The controversy crystallized in *Mink v. EPA*¹²² when petitioners brought a suit under the FOIA to compel disclosure of nine documents pertaining to underground nuclear tests to be conducted on Amchitka Island.¹²³ The agency's motion for summary judgment was granted on the basis of the FOIA exemptions for "national defense" and "intra-agency" memoranda. The circuit court reversed, concluding that the first exemption permits nondisclosure of only secret portions of classified documents but requires disclosure of the nonsecret com-

¹¹⁶ 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970).

¹¹⁷ *Epstein v. Resor*, 296 F. Supp. 214, 217 (N.D. Cal. 1969), *aff'd*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970).

¹¹⁸ 421 F.2d at 933; *cf.* *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972).

¹¹⁹ 421 F.2d at 933.

¹²⁰ 448 F.2d 1067 (D.C. Cir. 1971).

¹²¹ *Id.* at 1079.

¹²² 464 F.2d 742 (D.C. Cir. 1971), *rev'd*, 410 U.S. 73 (1973).

¹²³ A separate action to enjoin the nuclear experiment was brought in district court. The issue ultimately reached the Supreme Court, which denied, without opinion, the petitioners' application for an injunction. *Committee for Nuclear Responsibility, Inc. v. Schlesinger*, 404 U.S. 917 (1971).

ponents if separable.¹²⁴ The action was remanded with instructions to the district court to conduct an *in camera* inspection. The purpose of this inspection was to sort out the nonsecret portions which could be disclosed without compromising the secret documents that the FOIA intended to protect.¹²⁵ The *Mink* case presented the Court with the opportunity to illuminate the meaning of two major exemptions of the FOIA.¹²⁶ The respondents defended the circuit court's decision with three assertions: (1) the word "specifically" in the statute is to be strictly construed and requires an Executive Order specifically directing the classification,¹²⁷ (2) only those documents properly classified secret are exempt and those separable, unclassified components are subject to disclosure, and (3) the district court was authorized to determine which documents were improperly classified by means of *in camera* inspection.

By a 5-3¹²⁸ majority, the Supreme Court reversed. The Court held that the *de novo* judicial review provision did not authorize the district court to order production of the records or to conduct *in camera* inspection to sift out "nonsecret components."¹²⁹ Further, the scope of review is limited to the issue of whether or not the President has required by Executive Order that the documents in question are to be kept secret. This determination was based on both a literal reading of the statute and an analysis of the legislative history.¹³⁰ In the words of Mr. Justice White:

The language of the Act itself is sufficiently clear in this respect, but the legislative history disposes of any possible argument that Congress intended the Freedom of Information Act to subject

¹²⁴ 464 F.2d at 746.

¹²⁵ *Id.* at 746. The distinction between *facts* and *policy* is applied to matters under the fifth exemption.

¹²⁶ Exemption one, protecting records of national security, and exemption five, pertaining to inter-agency memoranda. FOIA § 552(b)(1) & (5). See notes 161-73 and accompanying text, *infra*, for analysis of the fifth exemption.

¹²⁷ Although the House Report indicates that *the President* must determine that the exempted matter be kept secret, [H.R. REP., *supra* note 12, at 10], the respondents do not assert this position because such a requirement would place an undue burden upon the office of the President. The respondents *do* assert however, that general Executive order does not qualify for exemption under one but rather "once a specific request for disclosure . . . is made under the Act, a refusal to release . . . can be justified only when the President issues a *specific* order that the matter is privileged under the (b)(1) exemption.

Brief for A.C.L.U. as Amicus Curiae at 19.

¹²⁸ The majority consisted of White, J., who delivered the opinion of the Court, joined by Burger, C.J. and Stewart, Blackmun, and Powell, JJ.

¹²⁹ 410 U.S. at 85.

¹³⁰ *Id.* at 81-83. *But see* dissenting opinion of Mr. Justice Brennan and Mr. Justice Marshall which states: "The Court's reliance on isolated references to Executive Order 10501 in the Congressional proceedings is erroneous and misleading." *Id.* at 101.

executive security classifications to judicial review at the insistence of anyone who might seek to question them.¹³¹

Accordingly, the Court concluded that Congress had specifically chosen to defer such matters to executive judgment and "that choice must be honored." The Court also concluded that the agency could satisfy its burden of proof by establishing that the records would not have been subject to subpoena in ordinary civil litigation. Thus, the allegations contained in the agency's affidavit submitted in support of its original motion for summary judgment were deemed sufficient¹³² to invoke the first exemption.

Dissenting Justice Brennan asserted that the majority misconceived the holding of the court of appeals.¹³³ He was of the view that the presence of derivative classifications¹³⁴ mandates the examination of the documents *in camera* in order to separate and release the non-classified components.¹³⁵ Finally, Mr. Justice Brennan concluded that the decision of the Court reduces the judicial role to "meaningless judicial sanction of agency discretion."¹³⁶

In a separate dissenting opinion, Mr. Justice Douglas stated that: "The majority makes the stamp sacrosanct, thereby immunizing stamped documents from judicial scrutiny"¹³⁷ He also argued that the majority had distorted and misconceived the judicial function. Specifically, the role of the district court should be "to determine whether nonsecret material was a mere appendage to a 'secret' or 'top secret' file."¹³⁸ Mr. Justice Douglas concluded that the Court has made a "shambles" of the FOIA by disrupting the "workable formula"¹³⁹ established in the legislative scheme.

¹³¹ *Id.* at 82.

¹³² *But see* Philadelphia Newspapers, Inc. v. HUD, 343 F. Supp. 1176, 1180 (E.D. Pa. 1972); Frankel v. SEC, 336 F. Supp. 675, 677 n.4 (S.D.N.Y. 1971); Cowles Communications, Inc. v. Dep't of Justice, 325 F. Supp. 726, 727 (N.D. Cal. 1971). In these cases the courts have not allowed the executive to merely submit an affidavit and by so doing foreclose any other determination of fact. *See also*, Bristol-Myers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

¹³³ 410 U.S. at 99.

¹³⁴ "A document [or file] . . . shall bear a classification at least as high as that of its highest classified component." Executive Order, *supra* note 115, § 3(c). *See generally* National Security Interest, note 115 *supra*.

¹³⁵ The position taken by Mr. Justice Brennan finds support in three areas: (1) a broad interpretation of the judicial review provision, (2) a consideration of the legislative history in light of the statutory purposes, *see* Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971); Wellford v. Hardin, 444 F.2d 21, 25 (4th Cir. 1971), and (3) the recognition of the FOIA in Executive Order 11,652.

¹³⁶ S. REP., *supra* note 8, at 8; H.R. REP., *supra* note 12, at 9.

¹³⁷ 410 U.S. at 108.

¹³⁸ *Id.* at 109.

¹³⁹ *Id.* at 109-10; S. REP., *supra* note 8, at 3.

In sum, the decision in *Mink*¹⁴⁰ represents the Court's first evaluation of the FOIA and may be interpreted on two levels. First, the first exemption precludes the compelled disclosure of classified documents and *in camera* inspection to sift out nonsecret components. Second, the Court clearly challenges the Congress to promulgate forceful, concise legislation or else be burdened with an ineffectual statute. The Court's impatience with Congressional inconsistencies was clearly expressed: "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures — *subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering.*"¹⁴¹ The decision in *Mink* contrasts a growing hostility between the Executive and the Legislature with the Judiciary's inclination to remain neutral.

Section (b)(2): [Matters] Related Solely to the Internal Personnel Rules and Practices of an Agency.

This section was included in the Act in order to provide some shelter for the internal personnel rules and practices of the agencies. The extension of subsection (a)(2)(C) to include administrative manuals¹⁴² necessitated a provision to protect agency privacy with respect to its internal affairs. Unfortunately, the Senate and House Reports are diametrically opposed. The Senate characterized this exemption as relating to "rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave and the like."¹⁴³ On the other hand, the House interpreted this exemption to mean that "operating rules, guidelines and manuals of procedure for Government investigators or examiners would be exempt from disclosure *but . . . not . . . employee relations and working conditions and routine administrative procedures . . .*"¹⁴⁴

The interpretation of the House has been adopted by the Second

¹⁴⁰ Some doubt as to the force of the majority opinion is generated by the cynical tone of Mr. Justice Stewart's concurring opinion. For example, he conceded that without this type of information "the people and their representatives [are] reduced to a state of ignorance [and] the democratic process is paralyzed." 410 U.S. at 95. Nevertheless, he concluded that Congress enacted the FOIA without the means to question an Executive determination that a document is "secret." And, by virtue of exemption one, Congress has chosen "blind acceptance of Executive fiat," regardless of "however cynical, myopic, or even corrupt" that Executive decision may be. *Id.* This language is exceptionally harsh and it is submitted that in future FOIA cases the stance of Mr. Justice Stewart as the deciding vote deserves close watching.

¹⁴¹ 410 U.S. 83 (emphasis added).

¹⁴² See note 62 and accompanying text *supra*.

¹⁴³ S. REP., *supra* note 8, at 8.

¹⁴⁴ H.R. REP., *supra* note 12, at 10 (emphasis added).

Circuit,¹⁴⁵ while the Senate interpretation has been adopted by the Sixth¹⁴⁶ and Ninth¹⁴⁷ Circuits. It is submitted that the better view is that of the Senate, based on the plain import of the statute's language and interpretation of the legislative history.¹⁴⁸

Section (b)(3): [Matters] Specifically Exempted From Disclosure by Statute.

This section echoes the language of the first exemption¹⁴⁹ and was included in order to foreclose any claims that the FOIA invalidated the "nearly 100 statutes or parts of statutes which restrict public access to specific Government records."¹⁵⁰ The scope of the third exemption has been the subject of several recent district court decisions involving the Social Security Act.¹⁵¹ The problem revolves around a provision which empowers the HEW Secretary to determine whether information obtained by the agency shall be made public. The method of inquiry was bifocal; whether such a provision amounts to a *specific* exemption by statute as required by the third exemption and, if so, whether the provision itself was applicable to the information sought. Two district courts¹⁵² have held that certain HEW annual reports are subject to disclosure notwithstanding the third exemption while on the identical question one district court¹⁵³ has refused to disclose. The latter view is

¹⁴⁵ *Polymers, Inc. v. NLRB*, 414 F.2d 999 (2d Cir. 1969), *cert. denied*, 396 U.S. 1010 (1970); *see Cuneo v. Laird*, 338 F. Supp. 504 (D.D.C. 1972); *City of Concord v. Ambrose*, 333 F. Supp. 958 (N.D. Cal. 1972) (dictum).

¹⁴⁶ *Haukes v. IRS*, 467 F.2d 787 (6th Cir. 1972).

¹⁴⁷ *GSA v. Benson*, 415 F.2d 878 (9th Cir. 1969); *accord*, *Stokes v. Hodgson*, 347 F. Supp. 1371 (N.D. Ga. 1972).

¹⁴⁸ "[T]he Senate interpretation was before the House when it voted to approve subsection (b)(2) in exactly the same form as had passed the Senate earlier. To adopt the statutory interpretation put forward in the House Report would be to allow a single house of the Congress to effectively alter the meaning placed on proposed legislation by the other house without altering a word of the text." 467 F.2d at 797.

¹⁴⁹ Here, too, "the only matter to be determined in a district court's *de novo* inquiry is the factual existence of such a statute, regardless of how unwise, self-protective or inadvertent the enactment might be." 410 U.S. at 95 n.* (Stewart, J., concurring).

¹⁵⁰ H.R. REP., *supra* note 12, at 10; ATT'Y GEN. MEMO., *supra* note 18, at 31. The case of *Richardson v. United States*, 465 F.2d 844 (3d Cir. 1972) is a recent case invoking this exemption and presents an interesting issue relating to the standing of a taxpayer to demand an accounting from the Government in regard to money expended by the CIA.

¹⁵¹ 42 U.S.C. § 1305 *et seq.* (1970).

¹⁵² *Schechter v. Richardson*, 41 U.S.L.W. 2366 (D.D.C. Jan. 16, 1973); *Serchuk v. Richardson*, 41 U.S.L.W. 2366 (S.D. Fla. Jan. 16, 1973).

¹⁵³ *California v. Richardson*, 351 F. Supp. 733 (N.D. Cal. 1972). *See also* Davis, *supra* note 10, at 786-87, where Professor Davis rejects the argument that the Commission, not the statute, is exempting the information. Professor Davis maintains that to hold otherwise would be to defeat the intent of the enabling statute which may well be more specific than the Information Act.

in contravention of the liberal disclosure mandate of the FOIA and these apparent conflicts between the statutes can be obviated by emphasizing the word "specifically." It is submitted that the provision leaving disclosure to the discretion of the Secretary is not *specific* within the context of the third exemption.

Section (b)(4):[Matters] Trade Secrets and Commercial or Financial Information Obtained From any Person and Privileged or Confidential.

The right of the Government to withhold information that it obtains from "any person"¹⁵⁴ but which would not ordinarily be released by that person to the public is protected by this exemption. With minor deviations, the Senate¹⁵⁵ and House¹⁵⁶ Reports run parallel. Unfortunately, poor draftsmanship has subjected the fourth exemption to conflicting interpretations.¹⁵⁷ Some courts read it to deny disclosure of documents which are confidential but not commercial or financial in nature¹⁵⁸ while others have held that this exemption applies when the information is either privileged or confidential *and* commercial or financial.¹⁵⁹ The Attorney General's memorandum contributes to the confusion when it says: "It seems obvious . . . that Congress neither intended to exempt all commercial and financial information on the one hand, nor to require disclosure of all other privileged or confidential information on the other."¹⁶⁰ Since what Congress *did* intend is not obvious, the meaning of the fourth exemption shall remain elusive until the courts or Congress can provide a definitive answer.

Section (b)(5): [Matters] Inter-Agency or Intra-Agency Memorandums or Letters Which Would Not Be Available by Law to a Party Other Than an Agency in Litigation With the Agency.

The legislative history of this exemption reveals that it was designed to protect certain internal communications. This section was included

¹⁵⁴ This phrase may include information from the public at large, a particular person, or a private institution. Included in the exempted material is information from within an agency. ATT'Y GEN. MEMO., *supra* note 18, at 34. *But see* Consumers Union v. Veteran's Administration, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), which requires that the information be obtained from outside the agency.

¹⁵⁵ S. REP., *supra* note 8, at 9.

¹⁵⁶ H.R. REP., *supra* note 12, at 10.

¹⁵⁷ See ATT'Y GEN. MEMO., *supra* note 18, at 32.

¹⁵⁸ Benson v. GSA, 289 F. Supp. 590 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969); Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D.P.R. 1967).

¹⁵⁹ Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970); Consumers Union v. Veteran's Administration, 301 F. Supp. 796 (S.D.N.Y. 1969).

¹⁶⁰ ATT'Y GEN. MEMO., *supra* note 18, at 34.

in response to agency contentions that premature disclosure of policy considerations would inhibit meaningful discourse. "They contended . . . that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.'" ¹⁶¹

The precise meaning of this exemption has revolved around two areas: (1) the distinction between factual matters and those involving decision-making processes and (2) the effect of the incorporation of a discovery standard.

The courts have unanimously accepted the distinction between fact and policy and demanded the disclosure of those materials relating to factual material while permitting the withholding of material related to decision-making. Some difficulty has arisen as to matters that are mixed treatments of fact and opinion. However, this problem was dispensed with in *Soucie v. David*,¹⁶² where the exemption was interpreted to mean that disclosure is compelled only when such factual material is not "inextricably intertwined with policy-making processes."¹⁶³ The court further held that this determination could be most effectively accomplished by *in camera* inspection in the district court.

This approach was re-asserted by the D.C. Circuit in *Mink v. EPA*.¹⁶⁴ There, the court remanded the action ordering an *in camera* inspection of documents to determine the factual data which was not "inextricably intertwined with policymaking processes" and that could be safely disclosed "without impinging on the policy-making decisional processes intended to be protected by the exemption . . ."¹⁶⁵

On review by the Supreme Court, this decision was remanded.¹⁶⁶ The Court, while adopting the distinction between purely factual matters and materials reflecting deliberative processes,¹⁶⁷ took issue with "the unmistakable implication" that the fifth exemption mandates *in camera* inspection in all instances.¹⁶⁸ It viewed this position as "un-

¹⁶¹ H.R. REP., *supra* note 12, at 10. See also S. REP., *supra* note 8, at 9; ATT'Y GEN. MEMO., *supra* note 18, at 34. This opinion was also expressed by President Johnson: "Officials within the Government must be able to communicate with one another fully and frankly without publicity." Johnson Statement, *supra* note 21.

¹⁶² 448 F.2d 1067 (D.C. Cir. 1971).

¹⁶³ *Id.* at 1078.

¹⁶⁴ 464 F.2d 742 (D.C. Cir. 1971).

¹⁶⁵ *Id.* at 747.

¹⁶⁶ 410 U.S. 73 (1973). Seven Justices concurred in this aspect of the decision, with only Justice Douglas dissenting.

¹⁶⁷ 410 U.S. at 91. The Court said that the question at issue was whether the disclosure would be "injurious to the consultative functions of government." *Id.* at 87. See *United States v. Reynolds*, 345 U.S. 1 (1953); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958).

¹⁶⁸ 410 U.S. at 92.

necessarily rigid." The Court postulated a flexible, common-sense approach whereby: (1) *in camera* inspection is acknowledged as a useful device *but it need not be automatic*,¹⁶⁹ and (2) the agency should be afforded the opportunity to satisfy its burden *by means of detailed affidavits or oral testimony*.¹⁷⁰ Only when these alternate means have failed to satisfy the burden should *in camera* examination be warranted.

The *Mink* decision also clarified the meaning of the qualifying clause that incorporates the civil discovery standard, *i.e.*, matters which "would not be available by law to a party other than an agency in litigation with the agency."¹⁷¹ Several courts have treated this qualifying clause as necessitating a consideration of the need of the demandant because such inquiry is made under ordinary discovery rules.¹⁷² Relying on the underlying policy of the FOIA, the Supreme Court expressly rejected this contention. The *Mink* decision states, "[n]or does the Act, by its terms, permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant."¹⁷³ In sum, the operation of the fifth exemption has been clearly delineated by the court in *Mink* thereby facilitating its application in the future.

Section (b)(6): [Matters] Personnel and Medical Files and Similar Files, the Disclosure of Which Would Constitute a Clearly Unwarranted Invasion of Personal Privacy.

This provision complements the thrust of the fourth exemption and clearly indicates the operation of the FOIA as a shield for the individual. The Senate Report provides:

The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from un-

¹⁶⁹ *Id.* at 93.

¹⁷⁰ *Id.*

¹⁷¹ FOIA § 552(b)(5). The House Report interprets this phrase to mean, "any internal memorandums which would *routinely* be disclosed . . . in litigation . . ." H. R. REP., *supra* note 12, at 10 (emphasis added).

The argument that the word "routinely" means that the *agency* would release them as a matter of course has been raised several times. However, this argument has been uniformly rejected. The prevailing interpretation is that inter-agency memos are subject to disclosure if a *court* would routinely order them produced, *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971); *Consumers Union v. Veteran's Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969); *Benson v. GSA*, 289 F. Supp. 590 (W.D. Wash. 1968).

¹⁷² See *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971); *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578 (D.C. Cir. 1970); *Shakespeare Co. v. United States*, 389 F.2d 772 (Ct. Cl. 1968); *Consumers Union v. Veteran's Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969); *Benson v. GSA*, 415 F.2d 878 (9th Cir. 1969). See also notes 27-33 and accompanying text, *supra*, relating to the "any person" provision.

¹⁷³ 410 U.S. at 86.

necessary public scrutiny, and the preservation of the public's right to governmental information.¹⁷⁴

Inasmuch as the sixth exemption specifically requires balancing, it is unique and expresses the FOIA's policy of protecting individual privacy.

Section (b)(7): [Matters] Investigatory Files Compiled for Law Enforcement Purposes Except to the Extent Available By Law to a Party Other Than an Agency.

The seventh exemption was included in the FOIA in order to prevent premature access to the Government's investigatory files.¹⁷⁵ Precisely which files may be exempted under this provision is unclear. The Senate Report applies it only to files prepared to "prosecute law violators."¹⁷⁶ A broader definition is espoused by the House Report; the seventh exemption includes those "files related to enforcement of all kinds of laws, labor and securities laws [including] . . . adjudicative proceedings."¹⁷⁷ Although few courts have spoken on this matter, the Fifth Circuit has specifically adopted the rule that this exemption is not limited to criminal law enforcement, but extends to law enforcement activities of all natures.¹⁷⁸

A significant controversy exists on the issue of whether the seventh exemption ceases when law enforcement proceedings terminate.¹⁷⁹ Those who favor the disclosure of investigatory files upon termination of the investigation and enforcement proceedings argue that the agencies should not be permitted to rely on the initial classification of a file to authorize the unwarranted withholding of information *ad infinitum*. The controversy is one of considerable import and has resulted in a conflict among circuits and district courts. The Court of Appeals for

¹⁷⁴ S. REP., *supra* note 8, at 9. See *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *Tuchinsky v. Selective Serv. Sys.*, 418 F.2d 155 (7th Cir. 1969).

¹⁷⁵ S. REP., *supra* note 8, at 9; H.R. REP., *supra* note 12, at 11; ATT'Y GEN. MEMO., *supra* note 18, at 38. See *Freeman v. Seligson*, 405 F.2d 1326 (D.C. Cir. 1968). Another reason for this exemption is to encourage informants by refusing to disclose their identity. The "informant's privilege" is a product of the Government's evidentiary privilege and is not dependent upon the FOIA. See PROPOSED FED. R. OF EVID. 510. The concept of informant's privilege, however, has been abused in several instances in FOIA cases. See *Commercial Envelope Mfg. Co. v. SEC*, 450 F.2d 342 (2d Cir. 1971); *Evans v. Department of Transp.*, 446 F.2d 821 (5th Cir. 1971); *NLRB v. Clement Bros.*, 407 F.2d 1027 (5th Cir. 1969); *Barcelona Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967). In these cases the courts have denied relief because the petitioners failed to establish sufficient need.

¹⁷⁶ S. REP., *supra* note 8, at 9.

¹⁷⁷ H.R. REP., *supra* note 12, at 11; ATT'Y GEN. MEMO., *supra* note 18, at 38.

¹⁷⁸ *NLRB v. Clement Bros.*, 407 F.2d 1027 (5th Cir. 1969).

¹⁷⁹ This question was considered by the draftsmen of the FOIA. The initial version of the FOIA provided that the exemption for investigatory files was limited by the provision that they would be privileged "until they were [used] and/or effect[ed] an action or proceeding or a private party's effective participation therein." S. REP. NO. 1666, 88th Cong., 2d Sess. (1964).

the District of Columbia¹⁸⁰ and a district court in the Third Circuit¹⁸¹ have adopted the position that an agency must disclose its files upon termination of enforcement proceedings. The Second Circuit¹⁸² and a district court in the Ninth Circuit,¹⁸³ on the other hand, have held that the material remains exempt even after the proceedings are concluded.

It should be noted that the seventh exemption is qualified by language very similar to the language found in exemption number five, *i.e.*, "except to the extent available by law to a party other than an agency."¹⁸⁴ In several cases¹⁸⁵ there is dicta to the effect that the petitioner must establish a degree of need. By drawing a parallel to the Court's treatment of this aspect of the fifth exemption, it appears that the *Mink* decision,¹⁸⁶ discussed above, would foreclose any examination into the particular need of the petitioner when dealing with the seventh exemption.

Section (b)(8): [Matters] Contained in or Related to Examination, Operating, or Condition Reports Prepared by, on Behalf of, or for the Use of Any Agency Responsible for the Regulation or Supervision of Financial Institutions.

The meaning of this exemption is self-evident.¹⁸⁷ This provision complements the fourth exemption and emphasizes the intention of protecting information concerning financial institutions.

¹⁸⁰ *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.) *cert. denied*, 400 U.S. 824 (1970). The court remanded the action to the district court to determine whether there was a realistic prospect of continued enforcement proceedings. "[T]he agency cannot, consistent with the broad disclosure mandate of the Act, protect all its files with the label 'investigatory' and a suggestion that enforcement proceedings may be launched at some unspecified future date." *Id.* at 939. *See also* *Schapiro & Co. v. SEC*, 339 F. Supp. 467 (D.D.C. 1972).

¹⁸¹ *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968), where the court held that the exemption for investigatory files applied to files relating to a contemplated lawsuit or enforcement proceedings. *See also* *Katz, The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261 (1970): "Once litigation is concluded, disclosure is impliedly required." *Id.* at 1279.

¹⁸² *Frankel v. SEC*, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972), where the court denied access to investigatory files of matters which had resulted in a consent decree. *See Second Circuit Note*, 47 ST. JOHN'S L. REV. at 223, (1972).

¹⁸³ *Cowles Communications, Inc. v. Department of Justice*, 325 F. Supp. 726 (N.D. Cal. 1971) where the court held that so long as a file is compiled for enforcement purposes, it need not be produced when law enforcement ceases.

¹⁸⁴ FOIA § 552(b)(7).

¹⁸⁵ *Williams v. IRS*, 345 F. Supp. 591, 594 (D. Del. 1972); *Benson v. United States*, 309 F. Supp. 1144 (D. Neb. 1970); *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968).

¹⁸⁶ *See* notes 171-73 and accompanying text *supra*.

¹⁸⁷ S. REP., *supra* note 8, at 9; H.R. REP., *supra* note 12, at 11; ATT'Y GEN. MEMO., *supra* note 18, at 38. Exemption eight is "designed to insure the security and integrity of financial institutions, for the sensitive details collected by Government agencies . . . could, if indiscriminately disclosed, cause great harm." H.R. REP., *supra* note 12, at 11.

Section (b)(9): [Matters] Geological and Geophysical Information and Data (Including Maps) Concerning Wells.

This exemption was added because the Congress felt that the disclosure of seismic and other exploratory reports would "give speculators an unfair advantage over the companies which spent millions of dollars in exploration."¹⁸⁸

CONCLUSION

The Freedom of Information Act is the embodiment of the first principle that the Government is the steward of the people and public records are the property of the people. This concept was articulated by President Johnson when he signed the FOIA into law:

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest"¹⁸⁹

The Act attempts to provide a workable balance among the people's right to know, the Government's right to a degree of confidentiality and the individual's right to privacy. In light of the all-inclusive objective, it is no wonder that the statutory scheme is replete with inconsistencies and ambiguities.

The task of mediating these diverse interests resides with the district courts. Although the Act has been interpreted with disclosure as the guiding star, the courts have tended to be protective where the Government's interest is more compelling, *i.e.*, matters relating to national defense and investigatory files. In general, the district courts have succeeded in effectuating a workable balance and as the body of case law grows the applicability of the FOIA will be further refined.

The decision in *Mink*¹⁹⁰ is extremely significant because it clarifies several important provisions of the FOIA. Moreover, in *Mink* the Court emphasizes the belief that the responsibility for insuring the public's right to know lies not only with the courts, but, to a great extent resides with the Congress. Thus, the Court challenged Congress to indicate a firm commitment to the idea of free information by providing a clearly delineated statute. The manner in which Congress

¹⁸⁸ H.R. REP., *supra* note 12, at 11; S. REP., *supra* note 8, at 9; ATT'Y GEN. MEMO., *supra* note 18, at 39.

¹⁸⁹ Johnson Statement, *supra* note 21.

¹⁹⁰ 410 U.S. 73 (1973).

responds will be of great interest.¹⁰¹ The *Bannercraft*¹⁰² case will provide the Court with a further opportunity to construe the FOIA and may further clarify the inconsistencies of the Act.

However, the most overwhelming impression that must emerge from studying the FOIA is a recognition that the Legislative, Executive and Judicial branches of Government must imbue in themselves and the agencies the general philosophy that the people *must* know how the government is discharging its duty as the steward of the people.

Frank Amoroso

¹⁰¹ The Nixon Administration recently proposed a new criminal code which provides that "a person is guilty of an offense if he knowingly communicates information relating to the national defense to a person not authorized to receive it." New York Times, April 22, 1973, at 18, col. 1. Under the present law the information must be such as to cause injury to the United States, and the validity of a security classification can be challenged. The proposed code precludes any questioning of the classification, thereby representing a codification of the *Mink* decision. This provision has been severely criticized by leading members of Congress and its passage is doubtful. New York Times, April 22, 1973, at 18, col. 1.

Thus, it appears that Congress is prepared to answer the challenge issued by the *Mink* Court with equal vigor.

¹⁰² 466 F.2d 345 (D.C. Cir. 1972), *cert. granted*, 41 U.S.L.W. 3409, No. 72-822 (U.S. Jan. 23, 1973).